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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 976

TOWNSHIP OF HAMILTON TOWNSHIP, in the County of Atlantic, a Municipal Corporation of the State of New Jersey, and WILLIAM DAVIES, NICHOLAS RETTINO, ROBERT J. KLEUSER, MICHAEL BUTLER, and ROBERT H. MORRIS, individually, as Citizens and Taxpayers of Atlantic County, and as members of the Hamilton Township Commitee,

Petitioners,

vs.

BOARD OF CHOSEN FREEHOLDERS of the County of Atlantic and G. T. B. COMPANY, a partnership, and ELIAS G. NAAME and HERMAN ORMAN, individually and as partners, and EDWIN H. HELFANT, Guardian Ad Litem for JOSEPH E. NAAME, an infant, and ATLANTIC COUNTY BAR ASSOCIATION.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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MacCrellish & Quigley Co., Printers, Trenton, New Jersey

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

TOWNSHIP OF HAMILTON TOWNSHIP, etc., *et al.*,
Petitioners,

vs.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

The Township of Hamilton Township and William Davies, Nicholas Rettino, Robert J. Kleuser, Michael Butler and Robert H. Morris, your Petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above entitled case on November 20, 1967.

Opinions Below

The opinion of the Honorable Anthony J. Cafiero, Assignment Judge of the Superior Court, Atlantic County, New Jersey, is set forth in the Appendix submitted by your petitioners on its appeal to the Appellate Division of the Superior Court of New Jersey at page 128a et seq. This opinion was not reported. This Appendix has been submitted as part of the record.

The opinion of the Supreme Court of New Jersey affirming the judgment of the trial court is set forth in Appendix A hereto, infra page 19.

Jurisdiction

1. The judgment of the Supreme Court of New Jersey was entered November 20, 1967 (infra, Appendix A, page 19). It is final by its terms.

2. The Federal question was raised in the Complaint (infra, Appendix A, page 12).

3. The jurisdiction of this Court is invoked under 28 U. S. Code 1257 (3).

Questions Presented

The questions presented are:

1. Does a Court Order to establish permanent Constitutional County Courts at locations other than the County Seat, in the absence of the vote of a majority of the qualified electorate as provided by statute, violate the Fourteenth Amendment to the United States Constitution?

2. Does the decision of a County Board of Chosen Freeholders to locate a permanent Constitutional County Court at a place other than the County Seat, in the absence of the vote of a majority of the qualified electorate as provided by statute, contravene the Ninth Amendment to the United States Constitution?

3. May a permanent Constitutional County Court be located at a place other than the County Seat?

Constitutional Provisions Involved

The Ninth Amendment to the Constitution of the United States provides:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people;"

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any State deprive any person of life, liberty or property without due process of law."

Article I, Section 21 of the New Jersey Constitution provides:

> "This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people."

Article VI, Section I (1) of the New Jersey Constitution provides:

> "The judicial power shall be vested in a Supreme Court, a Superior Court, County Courts, and inferior courts of limited jurisdiction. The inferior courts and their jurisdiction may from time to time be established, altered or abolished by law."

Statement of the Case

Atlantic County was created by an Act of the New Jersey Legislature passed February 7, 1837, from the eastern part of Gloucester County contained in the Townships of Galloway, Hamilton, Weymouth and Egg Harbor.

After the creation of the County elections were held, Freeholders elected from each township and Mays Landing, Hamilton Township, was selected as the County Seat.

From October 17, 1837 until May, 1926, all Atlantic County Court sessions were held in Mays Landing, Hamilton Township, the County Seat.

In 1900, the New Jersey Legislature passed Chapter 149, an Act entitled "An Act relative to the supreme and circuit courts." Paragraph 19 of this Act authorized the County Circuit Courts to be held at the times and places fixed by the Supreme Court.

On November 7, 1922, in the general election, the following public question appeared on the ballot: "Shall the

County Seat of Atlantic County be changed from Mays Landing, Hamilton Township, to the City of Atlantic City?'' The question was defeated and Mays Landing, Hamilton Township, remains the County Seat of Atlantic County.

On March 29, 1926, the New Jersey Legislature supplemented the 1900 Act by approving Chapter 253, authorizing the Supreme Court Justice holding the circuit in a county bordering on the Atlantic Ocean, by Order, to direct that supreme and circuit court issues triable in a county might be tried at a place other than the county seat.

Based on the Laws of 1900, Chapter 149, as supplemented, the Honorable Luther A. Campbell, Justice of the Supreme Court of New Jersey, signed an Order on April 12, 1926, ordering that Supreme and Circuit Court issues triable in the County of Atlantic be tried in the courtroom in the Guarantee Trust Building, Atlantic City, Atlantic County, New Jersey.

The Atlantic County Bar Association in recent years, has been urging the Board of Chosen Freeholders of Atlantic County, to provide sufficient and adequate Court facilities for the trial of civil causes in Atlantic City.

On June 30, 1966, the Honorable Anthony J. Cafiero signed an Order directed to the Board of Chosen Freeholders of Atlantic County to provide such facilities in Atlantic City, outside the county seat.

On December 14, 1966, the Board of Chosen Freeholders of Atlantic County passed a Resolution authorizing and directing the County Solicitor to negotiate a lease for space to house the County Court, with the G. T. B. Company, owners of the Guarantee Trust Building, in Atlantic City, for 5,500 square feet of space at $5.75 per square foot per year, under the terms of a 25-year lease.

Before any lease was signed, plaintiffs moved on Complaint in lieu of prerogative writ and Order to Show Cause for a restraining order with reference to the lease.

Hearings were held before the Honorable Anthony J. Cafiero, on May 26, 1967, May 31, 1967, and June 1, 1967.

It will be noted that during the course of the hearings, the trial judge stated that the Board of Chosen Freeholders had not actually complied with his Order and the facility they proposed to furnish was neither adequate nor under one roof as had been ordered by him.

On June 1, 1967, a motion by defendants-respondents for summary judgment was granted.

On June 2, 1967, a notice of appeal was filed by plaintiffs-appellants, the Petitioner herein, with the Appellate Division of the New Jersey Superior Court.

A motion for certification of the appeal by the respondents, to the Supreme Court of New Jersey was granted on September 19, 1967, and the cause argued before the New Jersey Supreme Court on October 24, 1967.

On November 20, 1967, the Supreme Court affirmed the judgment of the Court below and this petition for a writ of certiorari followed.

Reasons for Granting the Writ

Petitioners believe that this case presents an issue which has never been adjudicated and which should be determined. That issue involves the physical location of the Constitutional County Courts.

Petitioners submit that their concern is with the location of the Constitutional Courts set forth in New Jersey Constitution, Article VI, Section I (1) and while the New Jersey Constitution and New Jersey Statute law do not directly answer the question, there is proof, albeit indirect, that the matter of court location is covered by law. *L.* 1918, *c.* 195, now New Jersey Statutes Annotated 40:19–1 to 9 entitled "County Seat," is a material aid in answering this question.

The present County Seat of Atlantic County is Mays Landing, Hamilton Township. N. J. S. A. 40:19–1 authorizes changes in the county seat. 40:19–2 permits the board of chosen freeholders to adopt a resolution that the county seat be changed subject to the approval of a majority of the voters. 40:19–3 directs the board to pass a resolution on change on petition of at least 20% of the voters of the county. 40:19–4, 40:19–5 and 40:19–6 provide for the referendum, type of ballot, and submission of the question at the general election. 40:19–7 provides that if a majority of the voters approve the change in the location of the county seat "the board of chosen freeholders shall *thereupon* provide suitable lands and buildings necessary for the accommodation of the courts and offices, and for the transaction of the business of the county in the municipality to which the change shall be made, and shall suitably furnish and equip such buildings." (Italics added.) 40:19–8 provides that "after the acquisition and furnishing of such buildings, *the courts of the county and all the county officers shall be established therein.*" (Italics added.) 40:19–9 provides for only one such referendum in five years. The statute provides that the location of the county seat and the location of the county court are inextricably joined and the voters are the only ones who have the power to make a change in the court location.

The only referendum election ever held in Atlantic County pursuant to this Statute occurred in the general election of November 7, 1922. The question on the ballot was "Shall the County Seat of Atlantic County be changed from Mays Landing, Hamilton Township, to the City of Atlantic City?" The question was defeated and Mays Landing, Hamilton Township, has remained the County Seat. An attempt is now being made to do by indirection what could not be accomplished by statutory compliance.

The New Jersey Supreme Court has taken the position that there is nothing in the law which would require the location of courtroom facilities at the County Seat unless

the County Seat is changed. The Court stated that there was nothing in the State Constitution nor in New Jersey Statute law that indicated such a requirement.

If, as the Supreme Court of New Jersey stated, these Statutes apply only to a situation where the county electorate vote to change the location of the County Seat, we have an anomalous situation. *The Court has said in effect, that if the location of the County Seat is changed the location of the Courts must be changed to the new County Seat, but if there is no change in the location of the County Seat, the Courts may be placed in any other location within the county.* It is inconceivable that the New Jersey Legislature intended such an interpretation of New Jersey Statutes Annotated 40:19–1 to 9.

Chapter 40 states that it is the voters who are vested with the power to make the decision as to the location of the County Seat and through this decision the Court location; it is the voter who in the final analysis makes the determinations. In support of this right in the voter, the Ninth Amendment to the United States Constitution and its counterpart in the New Jersey Constitution, Art. I, Sec. 21, guarantee the right of the people to determine for themselves the location of the Courts, and this right cannot be taken away from them without violating the Fourteenth Amendment to the United States Constitution.

In a separate concurring opinion in *Griswold* v. *Connecticut,* 381 U. S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678, (1965) Mr. Justice Goldberg stated that certain basic rights are protected by the Ninth Amendment even though they may not be specifically guaranteed in so many words by the first eight Amendments to the Constitution. Justice Goldberg added (page 519) "the Ninth Amendment shows a belief of the Constitutions' authors that fundamental rights exist that are not expressly enumerated in the first eight Amendments, and an intent that the list of rights included there not be deemed exhaustive. As any student

of this Court's opinion knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgement by the Federal Government or the States. . . . The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight Constitutional Amendments. I do not see how this broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights."

Petitioners maintain that they have a fundamental right by their vote to choose the location of the Constitutional County Courts which right is further spelled out in New Jersey L. 1918, c. 185 (N. J. S. A. 40:19–1 to 9).

Justice Goldberg stated that the Court was not turning somersaults with history in arguing that the Ninth Amendment is relevant in cases dealing with a State's infringement of a fundamental right. He said (page 520) "While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments is surely relevant in showing the existence of other fundamental personal rights, now protected from State as well as Federal infringement. In sum, the Ninth Amendment simply lends strong support to the view that 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight Amendments."

Petitioners respectfully submit that the decision of the New Jersey Supreme Court herein denies the voters of At-

lantic County the right to vote on location of the County Seat as the method of determining the location of Constitutional County Courts. This denial violates N. J. S. A. 40:19–1 to 9 and thereby contravenes the Fourteenth Amendment in taking the ultimate right away from the people.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

PATRICK T. MCGAHN, JR.,
Attorney for Petitioners,
1421 Atlantic Avenue,
Atlantic City, N. J.

APPENDIX A

COMPLAINT IN LIEU OF PREROGATIVE WRIT

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—ATLANTIC COUNTY

Docket No. L-29242-66

TOWNSHIP OF HAMILTON TOWNSHIP, etc., *et al.*,

Plaintiffs,

vs.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC, etc., *et al.*,

Defendants.

} Civil Action.

PATRICK T. McGAHN, JR.,
Attorney for Petitioners,
1421 Atlantic Avenue,
Atlantic City, New Jersey.

COMPLAINT

(*Filed* 5/16/67.)

The Township of Hamilton Township, in the County of Atlantic, a Municipal Corporation of the State of New Jersey, and William Davies, Nicholas Rettino, Robert J. Kleuser, Michael Butler and Robert H. Morris, all residents of Mays Landing, County of Atlantic, individually, as citizens and taxpayers of Atlantic County, and as the duly elected members of the Hamilton Township Committee, complaining against the defendants, say:

1. Plaintiffs recognize that there is a definite and urgent need for more adequate court facilities in Atlantic County without unnecessary delay.

2. Plaintiffs contend that the Board of Chosen Freeholders of Atlantic County are bound by law to locate all permanent court facilities of Atlantic County at the County Seat in Mays Landing, New Jersey.

3. Temporary civil court facilities for Atlantic County have been furnished by the defendants, Board of Chosen Freeholders of Atlantic County, in the Guarantee Trust Building, in Atlantic City, County of Atlantic.

4. On June 30, 1966, the Honorable Anthony J. Cafiero, Judge of the New Jersey Superior Court, ordered civil court facilities to be established on a permanent basis in Atlantic City, County of Atlantic. A copy of the Order is attached and marked Exhibit "A".

5. Pursuant to this Order, the defendant, Board of Chosen Freeholders of Atlantic County passed a resolution on December 14, 1966, and took other necessary action authorizing the said Board to enter into a 25 year lease with the defendant, G. T. B. Company, for the purpose of providing such court facilities in Atlantic City, County of

Atlantic. A copy of this resolution is attached and marked Exhibit "B".

6. Plaintiffs question the authority of the defendant, Board of Chosen Freeholders of Atlantic County to establish permanent court facilities as proposed in any place other than the County Seat of Atlantic County, to wit, Mays Landing, maintaining that the provisions of New Jersey Constitution, Article I, Section 21, and Amendment 9 of the United States Constitution, reserve this right to the people.

7. Plaintiffs maintain that the authority granted to the defendant, Board of Chosen Freeholders of Atlantic County, by N. J. S. A. 40:32–3, to erect or lease such buildings as may be necessary and suitable for the accommodation of the courts required to be held in Atlantic County, does not give the defendant, Board of Chosen Freeholders of Atlantic County, power to erect such permanent facilities at a place other than the County Seat, and that the implied powers granted to defendants under New Jersey Constitution, Article IV, Section 7, paragraph 11, refer only to temporary court facilities.

8. Plaintiffs maintain that the County Courts do not have jurisdiction or authority to sit at a place other than the County Seat on a permanent basis.

9. Plaintiffs maintain that the Order of Honorable Anthony J. Cafiero, Judge of the Superior Court, set forth in paragraph 4 of this Complaint, is in violation of Article 3, Section 1 of the New Jersey Constitution and the 14th Amendment of the United States Constitution.

10. Plaintiffs contend that if a 25 year lease to furnish permanent court facilities is entered into between the defendant, Board of Chosen Freeholders of Atlantic County, and the defendant, G. T. B. Company and the partners of that partnership, Elias G. Naame and Herman Orman,

immediate, substantial and irreparable harm will result, in that the citizens of Atlantic County would be bound by a 25 year obligation to pay rent for a building within which the Courts could not legally function.

11. Neither plaintiffs nor defendants have sought by any other legal action to have adjudicated their respective rights involving the matter herein in dispute.

WHEREFORE, plaintiffs demand judgment whereby this Court shall:

A. determine the validity of the said Resolution dated December 14, 1966, of the Board of Chosen Freeholders of Atlantic County authorizing the Board to enter into a lease for permanent court facilities.

B. determine whether the defendant, Board of Chosen Freeholders of Atlantic County has the authority to enter into a contract or lease whereby permanent court facilities shall be established other than at the County Seat.

C. enjoin the defendant, Board of Chosen Freeholders of Atlantic County and its servants, agents and employees, acting under their Resolution dated December 14, 1966, from entering into such a lease.

D. enjoin the Board of Chosen Freeholders of Atlantic County and its servants, agents and employees, from carrying out the terms of the said lease until the rights of the parties herein are finally determined.

E. enjoin the defendant, G. T. B. Company and the partners of that partnership, Elias G. Naame and Herman Orman, or their servants, agents and employees, from entering into such a lease or acting under such lease.

F. declare the Order of Honorable Anthony J. Cafiero, Judge of the Superior Court, dated June 30, 1966, to be

null and void as to the location of permanent court facilities in Atlantic City.

G. afford such other and further relief as may be proper to prevent immediate, substantial and irreparable harm to the parties hereto.

/s/ PATRICK T. MCGAHN, JR.
PATRICK T. MCGAHN, JR.
Attorney for Plaintiffs.

EXHIBIT "A"

Superior Court of New Jersey
Law Division, Atlantic
County

In the Matter of Providing Court Facilities for the Trial of Civil matters in Atlantic County. } ORDER

By virtue of an order heretofore entered under date of April 12, 1926 by the late Luther A. Campbell, Justice of the former Supreme Court, it was ordered that the Supreme and Circuit Court issues triable in the County of Atlantic Shall be tried in the Courtroom in the Guarantee Trust Building, Atlantic City, Atlantic County, New Jersey.

Under recent date, the Atlantic County Bar Association in regular meeting duly assembled, adopted a resolution in which it deplores the condition which exists, and which it terms inadequate and detrimental to due process and to the proper administration of justice; and urges the Assignment Judge of Atlantic County to exercise the powers of his office in calling upon the Board of Chosen Freeholders of Atlantic County to provide sufficient and adequate Court facilities for the trial of civil causes in one building located in the City of Atlantic City; and

The undersigned being fully satisfied of the existence and the effects of said condition and the imperative need for such facilities;

It is on this 30th day of June, 1966, ORDERED that the Board of Chosen Freeholders of the County of Atlantic provide the facilities as requested without unnecessary delay; and that the trial of all civil issues triable in the Civil Courts of the County of Atlantic shall be tried in the facilities to be so provided.

This order shall take effect immediately.

A. J. Cafiero, /s/
A. J. Cafiero, J.S.C.
Assignment Judge
Atlantic County

EXHIBIT "B"

(RE: Additional Court Facilities)

RESOLUTION

WHEREAS, the Director of this Board did appoint a special committee for the purpose of investigating and making recommendations for additional court facilities, which were deemed necessary and was pursuant to an order of the Honorable A. J. Cafiero, Assignment Judge for Atlantic County; and

WHEREAS, such committee has thoroughly investigated the feasibility and the location of such required court facilities and has further explored the various areas which would be most advantageous for the public benefit in connection therewith; and

WHEREAS, such committee has interviewed numerous sources for the purpose of either constructing or renting adequate court facilities and has received proposals and suggestions therein, which they have thoroughly considered; and

WHEREAS, as a result of their continued efforts, the said special committee has received a proposal from the G. T. B. Company, for leasing court room facilities which this committee feels is the best proposal under the circumstances and at a rental basis which would be acceptable to the Board of Chosen Freeholders for the purpose of effectuating the order of the Honorable A. J. Cafiero, in connection therewith and the matter is now before this Board for its consideration, upon the recommendation of such special committee aforesaid.

NOW THEREFORE BE IT RESOLVED by the Board of Chosen Freeholders that it does hereby accept the offer of the G. T. B. Company to rent to the County of Atlantic for court facilities an area of 5500 square feet at $5.75 per square foot, per year, based on a twenty-five year lease for the purpose among other things of providing two additional court rooms to be constructed in a building adjacent to the present Guarantee Trust Building, North Carolina and Atlantic Avenues, Atlantic City, New Jersey.

BE IT FURTHER RESOLVED that the County Solicitor be and he is hereby authorized and directed to negotiate a lease with the G. T. B. Company for the said 5500 square feet referred to at $5.75 per square foot, per year, under the terms of a twenty-five year lease with the County of Atlantic, which lease will likewise provide for an escalator clause, covering additional increase in taxes, for any additional taxes assessed over the first year on a pro rata percentage basis. Said lease shall likewise provide for the lessor to furnish the services of lighting, air conditioning, heating,

cleaning services, Judges' bench, witness stand, jury box and required rails.

BE IT FURTHER RESOLVED that in addition to the two court rooms provided by the G. T. B. Company in accordance with the above lease referred to, the Board of Chosen Freeholders has provided two court rooms in Mays Landing and are in the process of providing one more additional court room in Mays Landing and two court rooms already provided on the seventh floor in the Guarantee Trust Building, thus making available for court facilities of seven court rooms, which are being completely modernized and adequately refurbished for the administration and use of our courts in Atlantic County.

ADOPTED: December 14, 1966.

IN THE

Supreme Court of New Jersey

SEPTEMBER TERM, 1967

No. A-55

TOWNSHIP OF HAMILTON TOWNSHIP, etc., *et al.*,
Plaintiffs-Appellants,

VS.

BOARD OF CHOSEN FREEHOLDERS, etc., *et als.*,
Defendants-Respondents.

OPINION

Argued October 24, 1967—Decided November 20, 1967.

On appeal from the Superior Court, Law Division, Atlantic County.

Mr. Patrick T. McGahn, Jr. argued the cause for plaintiffs-appellants.

Mr. Isaac C. Ginsburg, attorney for the Atlantic County Bar Association, argued the cause for defendants-respondents *(Mr. Abraham Rosenberg,* Assistant Solicitor of Atlantic County, and *Mr. Robert H. Davisson,* attorney for G. T. B. Company, a partnership, Elias G. Naame and Herman Orman, individually and as partners, and Edwin H. Helfant, guardian *ad litem* for Joseph E. Naame, an infant, joined in the brief).

The opinion of the court was delivered.

Opinion

PER CURIAM

Plaintiffs' action in lieu of prerogative writs challenged the validity of a resolution of the Atlantic County Board of Chosen Freeholders authorizing a 25-year lease of certain premises in Atlantic City in order to provide for additional courtrooms. They do not question the pressing need of more courtrooms but contend that as a matter of law all permanent facilities intended for constitutional courts (such as the County and Superior Courts) must be located at Mays Landing, the county seat. Summary judgment went in defendants' favor after a full hearing. The resultant appeal is before this court on direct certification.

On June 30, 1966 the Atlantic County Bar Association adopted a resolution urgently requesting the assignment judge to issue an order calling upon the freeholder board "to provide sufficient court facilities for the trial of civil causes in one building in the City of Atlantic City." The judge entered such an order *ex parte*. The freeholder board then appointed a special committee which, after thoroughly exploring various locations and the feasibility of either constructing or renting the needed facilities, recommended the lease in question as the best possible arrangement. On December 14, 1966 the board, after reviewing the work of its committee and consulting with the assignment judge, passed the resolution here under attack.

Plaintiffs claim that the trial judge was disqualified from hearing and determining the in lieu action because his prior *ex parte* order constituted the giving of an "opinion" under *N. J. S.* 2A:15–49(c). That statute provides that no judge shall sit on the trial or argument of any pending controversy when he has "given his opinion upon a matter in question in such action." We find no merit in plaintiff's contention; there was no disqualifying opinion here. The *ex parte* order was, of course, unaccompanied by any legal argument or plenary consideration

of the legal issues. The assignment judge, intimately acquainted with the bar association's long continuing efforts to correct the lack of adequate court facilities, and in the exercise of his administrative responsibilities, routinely entered the order calling upon the freeholder board to take action to meet a felt need. In this connection it should be observed that *N. J. S.* 2A:15–49 also provides that a trial judge is not disqualified merely because he has given his opinion on any question in controversy in the pending action in the course of previous proceedings therein.

Contrary to plaintiffs' position, we find nothing in the law which requires that the courtroom facilities had to be located at the county seat. Our State Constitution carries no such requirement, nor does our statute law. Plaintiffs rely on *L.* 1918, *c.* 185, now *N. J. S. A.* 40:19–1 to 9. The provisions of that act are inapplicable; they deal with a situation where the county electorate has voted to change the location of the county seat, in which case the courts are to be established at that place.

We need not decide whether the court itself—here acting through the assignment judge—may order that additional court facilities be provided at other than the county seat. The fact is that the freeholder board, after consulting with the assignment judge and considering the independent study made by its special committee, authorized the new courtrooms in Atlantic City. Under *N. J. S. A.* 40:32–3 a freeholder board may purchase, erect or otherwise acquire and maintain such buildings as may be necessary and suitable for the accommodation of the courts required to be held in the county. And *R.S.* 40:32–1 provides that where the board is empowered to acquire real estate or construct any buildings for any purpose, it may acquire such real estate or buildings by lease.

The judgment is affirmed.

CHAPTER 19

COUNTY SEAT

"40:19–1. Change of county seat

The county seat of any county may be changed from one municipality to another therein, in the manner hereafter in this chapter provided.

40:19–2. Resolution; submission to voters

In order to effect the change, the board of chosen freeholders shall adopt a resolution that the county seat shall be changed to a municipality other than that in which it is then located, designating the other municipality by name.

The resolution shall not become effective until a majority of the legal voters of the county shall vote in the manner hereinafter provided, for the proposed change.

40:19–3. Petition for resolution; resolution on initiative of board

If a petition signed by at least twenty per cent of the legal voters of the county shall be presented to the board, requesting such a change of the county seat from one municipality to another therein named, the board shall pass a resolution therefor.

The board of chosen freeholders may pass such resolution on its own initiative.

40:19–4. Referendum

Upon the passage of the resolution, the clerk of the board of chosen freeholders shall forthwith transmit a certified copy thereof to the proper officer, notifying him that a vote is desired upon the question. Such officer shall, in

the manner and form provided by law, place the same upon the ballots used at the next general election occurring not less than thirty days after the passage of the resolution.

40:19–5. Ballot; form and content

The question shall be printed upon the ballots to be used at the election in substantially the following form:

"To vote upon the public question printed below, if in favor thereof mark a cross (×) or plus (+) in the square at the left of the word YES, and if opposed thereto mark a cross (×) or plus (+) in the square at the left of the word NO.

"Shall the county seat of ..... county

☐ YES be changed from ..... to .....

☐ NO (specify names of municipalities)?"

40:19–6. Submission at general election; law applicable

The question shall be voted upon at said next general election, and the votes shall be canvassed, and the result determined and announced in the manner provided by the laws relating to elections.

40:19–7. Vote required for adoption; board to provide accommodations

If a majority of the legal voters voting at the election shall vote YES the board of chosen freeholders shall thereupon provide suitable lands and buildings necessary for the accommodation of the courts and officers, and for the transaction of the business of the county in the municipality to which the change shall be made, and shall suitably furnish and equip such buildings.

N. J. S. A. 40:19–1 through 9

40:19–8. Courts and county officers established in new county seat

After the acquisition and furnishing of such buildings, the courts of the county and all the county officers shall be established therein. As amended L. 1953, c. 37, p. 637 § 22, eff. March 19, 1953.

40:19–9. Resubmission

A vote upon such question shall not be taken oftener than once in five years in the same county."

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 976.

TOWNSHIP OF HAMILTON TOWNSHIP, in the County of Atlantic, a Municipal Corporation of the State of New Jersey, and WILLIAM DAVIES, NICHOLAS RETTINO, ROBERT J. KLEUSER, MICHAEL BUTLER, and ROBERT H. MORRIS, individually, as Citizens and Taxpayers of Atlantic County, and as members of the Hamilton Township Committee,

Petitioners,

vs.

BOARD OF CHOSEN FREEHOLDERS of the County of Atlantic and G. T. B. COMPANY, a partnership, and ELIAS G. NAAME and HERMAN ORMAN, individually, and as partners, and EDWIN H. HELFANT, Guardian Ad Litem for JOSEPH E. NAAME, an infant, and ATLANTIC COUNTY BAR ASSOCIATION,

Appellees-Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey.

BRIEF OF APPELLEES-RESPONDENTS, BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC AND ATLANTIC COUNTY BAR ASSOCIATION,

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STATEMENT OF QUESTION INVOLVED.

Does the place of holding court in a state involve any federal question?

STATEMENT OF THE CASE.

The petitioners filed an action in the Law Division of the Superior Court of New Jersey, alleging that the Freeholders of Atlantic County, New Jersey, were about to enter into a lease for court facilities in Atlantic City in said county and state. (Complaint, Appendix A, page 12.)

The petitioners alleged in the cited complaint that they "question the authority of the defendant, Board of Chosen Freeholders of Atlantic County to establish permanent court facilities as proposed in any place other than the County Seat of Atlantic County * * *". (Appendix A, page 13, para. 6 of complaint.)

The Supreme Court of New Jersey, in a per curiam opinion, dismissed petitioners' contention as without merit.

The petitioners seek the allowance of a writ of certiorari to review the holding of the New Jersey Supreme Court on the basis of the provisions of U. S. Statute, 28 U. S. C. A. 1257 (3).

The respondents oppose the granting of such writ, and move the Court to deny the allowance of the writ and to dismiss the petition for failure to present a federal question.

LAW AND ARGUMENT.

I. No Federal question was presented to the New Jersey Supreme Court for decision.

The rules of practice for the New Jersey Supreme Court make provision for the proper presentation of questions

for decision as a prerequisite to consideration of issues by the court.

R. R. 1:7-1, partially provides that

> "the brief of the appellant shall contain the following matters * * *
>
> (c) a statement of the questions involved * * *
>
> The foregoing requirements are to be considered in the highest degree mandatory, admitting no exceptions; ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved."

The petitioners failed and neglected completely to indicate in their "Statement of Questions Involved" in their Brief before the New Jersey Appellate Court that any federal question was involved in the cause before the court for adjudication.

We here repeat the "Statement of Questions Involved" as recited in petitioners' brief before the New Jersey Supreme Court (Page 1, Brief of Appellants—Petitioners in New Jersey Appellate Court):

> "1. Should a judge who has previously issued an Order which is involved in current litigation before him disqualify himself from hearing the current cause." (This is not now presented to this Court as an issue.)
>
> "2. Where there is an admitted urgent need for permanent court facilities of a Constitutional County Court in a County, may such permanent facilities be located in a place other than at the County Seat as a matter of law." (The Constitution referred to is the N. J. Constitution, not the U. S. Constitution.)
>
> "3. May a County Board of Chosen Freeholders enter into a lease for permanent court facilities of a constitutional County Court at a location other than at the County Seat as a matter of law."

It is obvious that there was no attempt to indicate to the Appellate Court below that there was a desire by these petitioners to present a question having federal overtones.

Nor is there any discussion in the petition filed in this Court to indicate the federal questions involved.

It is incumbent upon the petitioners to indicate that the federal question contended for was properly presented to the state court for adjudication. *Citizens Savings Bank v. Owensboro,* 173 U. S. 636, 19 S. Ct. 530, 43 L. Ed. 840 (1899). *Edelman v. California,* 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387 (1952).

This court is always wary of assuming jurisdiction of a case from a state court, unless it is plain that a federal question is necessarily presented, *Department of Mental Hygiene of Cal. v. Kirschner,* 85 S. Ct. 871, 380 U. S. 194, 13 L. Ed. (2) 753 (1965), and the burden is upon petitioner to show that a federal question is involved in the case presented. Ibid.

The passing mention of the U. S. Constitution in the brief of these petitioners in the state court would be inadequate. *Thomas v. Iowa,* 28 S. Ct. 487, 209 U. S. 258, 52 L. Ed. 782 (1908); *Louisville v. Smith,* 27 S. Ct. 401, 204 U. S. 551, 51 L. Ed. 612 (1907); *Durley v. Mayo,* 176 S. Ct. 806, 351 U. S. 277, 100 L. Ed. 1178 (1956); *Slagle v. Ohio,* 81 S. Ct. 1076, 366 U. S. 259, 6 L. Ed. (2) 277 (1961); *Michael v. Louisiana,* 76 S. Ct. 158, 350 U. S. 91, 100 L. Ed. 83 (1955); *Shelley v. Kraemer,* 68 S. Ct. 836, 334 U. S. 1, 92 L. Ed. 1161 (1948); *Lassiter v. Northampton,* 79 S. Ct. 985, 360 U. S. 43, 3 L. Ed. (2) 1072 (1959).

The record must reveal that the federal question was raised in the State Court. *Wilson v. Cook,* 66 S. Ct. 663, 327 U. S. 474, 90 L. Ed. 793 (1946); *Whitney v. California,* 47 S. Ct. 641, 274 U. S. 357, 71 L. Ed. 1095 (1927).

And the Supreme Court of New Jersey made no findings involving federal law, *Herb v. Pitcairn,* 324 U. S. 117, 89 L.

Ed. 789, 65 S. Ct. 459 (1945); *Charleston v. Alderson*, 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624 (1945), with the result that this court will not review that decision. Ibid.

II. The issue involved turns upon a local, non Federal question.

As support for the present application the petitioners cite *Griswold v. Connecticut*, 381 U. S. 479, 14 L. Ed. (2) 510, 85 S. Ct. 1678 (1965), which we conceive is in no way applicable or pertinent to the present factual or legal situation.

The holding by this Court in *Griswold*, was that a state statute making it a criminal offense for a married couple to use contraceptives was invalid as an invasion of privacy, the court stating:

> "The present case, then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."

We conceive that there is no doubt that the ninth and the tenth amendments to the U. S. Constitution preserve to the people their natural and personal rights. We agree that such rights may not be abridged by either the State or the Federal Government.

But the right to have a court located at a certain place or at the county seat is neither a personal or a natural right.

This Court pointed out in *Bute v. Illinois*, 333 U. S. 640, 65 S. Ct. 763, 92 L. Ed. 986 (1947):

> "* * * the reserved powers of the states and of the people were emphasized in the ninth and tenth amendments. The Constitution was conceived in the spirit of the Declaration of Independence which declared that to secure such 'unalienable rights' as those of 'Life,

> Liberty, and the pursuit of Happiness * * * Governments are instituted among men deriving their just powers from the consent of the governed * * *.' While there have been modifications made by the states, the congress and the courts in some of the relations between the Federal Government and the people, there has been no change that has taken from the States their underlying control over their local police powers and state court procedures. They retained their control from the beginning, and, in some states, local control of these matters long antedated the constitution. * * * The differing needs and the customs of the respective states and even of the respective communities within each state emphasize the principle that familiarity with and complete understanding of local characteristics, customs and standards are foundation stones of successful self government."

And the question of the place of holding court is purely a question of administration and expediency to be decided by the proper division of the local government.

Where the place of holding court is fixed by the State Constitution or Statute, the court must be held there. 20 Am. Jur. (2) 414. But where the place of holding court is not so fixed, the court may properly be held at any place within the territorial ambit of its jurisdiction which it elects for this purpose. Ibid.

And this is a matter which is to be decided locally, and is in nowise controlled by the Federal Constitution or Statutes.

As stated by Justice Frankfurter while sitting in circuit in *Uphans v. Wyman*, 81 S. Ct. 22, 5 L. Ed. (2) 29 (1960), where the question was the proper construction of a statute in New Hampshire:

> "The essential contention on which review is proposed to be sought here is thus a local, non federal

question howsoever paraphrased in intricate, subtle terms."

III. The provisions of the Ninth Amendment to the United States Constitution are in no way involved.

The power to create state courts is in the states, and may be utilized in any way which the state constitution or statute provides, 20 Am. Jur. (2) 407, Courts, Section 27. See also section 18 at page 401.

And this Court will not inquire into the rules of practice of the state courts, nor attempt to control them. *Wagner v. Lyndon,* 43 S. Ct. 589, 262 U. S. 226, 67 L. Ed. 961, cert. den. 43 S. Ct. 361, 261 U. S. 614, 67 L. Ed. 827.

Thus it has been held that question of rights under a state constitution are for the exclusive determination of the state courts. *State ex rel. Dyer v. Sims,* 71 S. Ct. 559, 341 U. S. 22, 95 L. Ed. 713.

Nor will this court take jurisdiction if the state court has erroneously construed a state statute, *Washington v. Marieopa,* 152 F. (2) 556, cert. den. 66 S. Ct. 900, 327 U. S. 799, 90 L. Ed. 1024, nor will the validity of a state statute under the state constitution create a federal question. *Utley v. City of St. Petersburg,* 292 U. S. 106, 54 S. Ct. 593, 78 L. Ed. 1155 (1933); *Rindge v. Los Angeles,* 262 U. S. 700, 43 S. Ct. 689, 67 L. Ed. 1186 (1922).

Not only is there no constitutional right of the people to designate the place of holding court, 20 Am. Jur. (2) 400, Courts, Section 17, but there is no federally given right to vote at all. The right to vote is conferred by the state and not by the constitution of the United States or any act of Congress. *Breedlove v. Suttes,* 302 U. S. 277, 58 S. Ct. 205, 82 L. Ed. 252 (1937); *Minor v. Happersett,* 88 U. S. 162, 22 L. Ed. 627 (1875).

It is clear, therefore, that any argument or contention that the denial of the right to vote for a county seat or for a place of holding court is without merit whatever, and certainly presents no federal question.

The Statute of New Jersey on which the petitioner relies as the basis of the federal question giving this court jurisdiction in no way involves a constitutional problem, and as was pointed out by the New Jersey Supreme Court, that statute is not involved whatever in the particular facts in this case.

The question with which we are concerned here was aptly stated by the present petitioners in their brief in the State Court:

> "1. * * *
>
> 2. Where there is an admitted urgent need for permanent court facilities of a constitutional county court in a county, may such permanent facilities be located in a place other than at the County Seat as a matter of law?
>
> 3. May a County Board of Chosen Freeholders enter into a lease for permanent court facilities of a constitutional county court at a location other than at the County Seat as a matter of law."

Obviously no question of the removal of the county seat from one place to another was involved. And if there were, it still would not present a question within the jurisdiction of this Court. Cf. 20 C. J. S. 809, Counties, section 54.

The Supreme Court of New Jersey disposed of petitioners' contention as to the applicability of N. J. S. A. 40:19-1, et seq., as follows:

> "Contrary to plaintiffs' position, we find nothing in the law which requires that the courtroom facilities had to be located at the county seat. Our State Constitution carries no such requirement, nor does our

> statute law. Plaintiffs rely on L. 1918C 185, now N. J. S. A. 40:19-1 to 9. The provisions of that act are inapplicable; they deal with a situation where the county electorate has voted to change the location of the county seat, in which case the courts are to be established at that place." (Appendix A, page 21, Opinion.)

And though the State Court may be mistaken in its conclusions, this court will not act as an appellate court to review state court errors where no federal question is involved. *Rindge v. Los Angeles County,* 262 U. S. 700, 43 S. Ct. 689, 67 L. Ed. 1186 (1922), supra. *Memphis and Charleston v. Pace,* 282 U. S. 241, 51 S. Ct. 108, 75 L. Ed. 315 (1930).

CONCLUSION.

No federal question was presented to the State Court for decision. Nor was such question properly raised as required by the Rules of Practice of the New Jersey Courts.

No federal question is here involved, nor is a violation of the ninth amendment to the Federal Constitution demonstrated.

In any event the question here involved is moot by reason of the withdrawal of the proposed lessor in the lease negotiations for the erection of courtroom facilities. *Doremus v. Board of Hawthorne,* 70 S. Ct. 394, 342 U. S. 429, 96 L. Ed. 475 (1952); *Richardson v. McChesney,* 31 S. Ct. 43, 218 U. S. 487, 54 L. Ed. 1121 (1909).

As a result there is no merit to the questions presented to this court; there is no issue of which this court will assume jurisdiction; and no constitutional or federal questions are involved.

The petition for writ of certiorari should be dismissed and the application denied.

Respectfully submitted,

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